In the Supreme Court of the United States

OCTOBER TERM, 1975

CASE NO. 75-1451

OAKLEY G. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Oakley G. Smith, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on 17 November 1975.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 523 F.2d 771 and is reproduced at pages 1-29 of the attached appendix.[1] The opinion-order of the Fifth Circuit denying rehearing (A 32) is reported at ____ F.2d ____.

JURISDICTION

The Fifth Circuit's judgment was entered on 17 November 1975 (A 30). Rehearing and rehearing *en banc* were denied on 13 February 1976 (A 32).

On 1 March 1976 this Court entered an order extending the time for filing a petition for writ of certiorari to and including 13 April 1976.

Jurisdiction to review the Fifth Circuit judgment by writ of certiorari is conferred on this Court by Title 28, USC § 1254(1).

[1]Hereafter, all references to the attached appendix will be designated by the symbol "A". All emphasis is ours unless otherwise indicated.

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE DEFENDANT MAY BE CHARGED "AT THE DISCRETION OF THE PROSECUTION" WITH VIOLATION OF A GENERAL *FELONY* FALSE CLAIMS STATUTE WHERE THE PARTICULAR ACTS SPECIFIED IN THE INDICTMENT ARE A *MISDEMEANOR* UNDER THE LATER PROVISIONS OF THE SOCIAL SECURITY ACT.

II

WHETHER A DEFENDANT MAY LAWFULLY BE CONVICTED OF MAKING A FALSE STATEMENT WHEN THAT WHICH THE GOVERNMENT CONTENDS WAS FALSE WAS ACCURATE AND IN COMPLETE ACCORD WITH THE INSTRUCTIONS OF THE GOVERNMENTAL AGENCY TO WHICH IT WAS SUBMITTED.

STATUTES INVOLVED

The statutory provisions involved are Title 18, USC §1001, and Title 42, USC §408(c). Title 18, USC §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 42, USC §408(c) provides:

> Whoever —
>
> * * *
>
> (c) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter;
>
> * * *
>
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

STATEMENT OF THE CASE

The procedural background of the case and the facts pertinent to this certiorari proceeding are set forth in the opinion of the Fifth Circuit, which affirmed the conviction of Petitioner Oakley G. Smith. While we do not necessarily agree with several of the factual conclusions of the court below, nevertheless they are assumed *arguendo* to be correct for the purpose of this petition. The opinion states:

> Oakley G. Smith was charged in a nine count indictment with having violated three federal statutes, one count relating to each offense for each of three successive years. Counts One through Three alleged appellant had, in violation of Title 18, U.S.C. Section 1001, made false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare; Counts Four through Six charged him with making and subscribing to false income tax returns for an exempt organization, Palm Springs General Hospital, in violation of Title 26, U.S.C. Section 7206; and Counts Seven through Nine charged him with willfully attempting to evade personal income tax, contrary to the provisions of Title 26, U.S.C. Section 7201. Appellant was found guilty, following a jury trial, on Count Three, willfully making false statements in a matter within the jurisdiction of H.E.W. in the fiscal year 1971. He was found not guilty on the other eight counts. Post-trial motions for judgment of acquittal (renewing motions made at the close of the government's case and again at the close of the evidence), for new trial and in an arrest of judgment were denied; judgment

of conviction and sentence followed. Smith appeals from the judgment and sentence.

(523 F.2d at 773; A. 7-8)

* * *

Count Three of the indictment reads:

> That on or about the 21st day of January, 1972, in the Southern District of Florida,
>
> OAKLEY G. SMITH,
>
> the defendant herein, willfully and knowingly did make and cause to be made false, fictitious and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Health, Education and Welfare, in that cost reports, Social Security Administration Forms 1563, 1562, and 1992, for the fiscal year ending June 30, 1971, were submitted to Blue Cross of Florida, an agent and fiscal intermediary of the United States Department of Health, Education and Welfare, wherein OAKLEY G. SMITH stated and represented that the expenses and costs set forth in Forms 1563, 1562, and 1992, were costs reimbursable under Title 18, Social Security Act, as amended, for the operation of Palm Springs General Hospital, Inc. of Hialeah, Florida. Whereas, in truth and fact, as he then well knew, the expenses and costs set forth in Forms 1563, 1562, and 1992, were not reimbursable costs but included purchases and expenditures which were false and fraudulently represented to be costs for the operation of Palm Springs General Hospital, Inc. of Hialeah, Florida.

> All in violation of Title 18, United States Code, Section 1001.

(523 F.2d at 778; A. 19-20)

* * *

The appellant, Oakley G. Smith, was president and chairman of the Board of Trustees of Palm Springs General Hospital at Hialeah, Florida (PSGH, or the hospital). PSGH was a non-profit tax-exempt institution, which participates as a "provider" hospital in the Medicare program. Medicare is a program of the United States Department of Health, Education and Welfare (HEW), more specifically, the Social Security Administration. Blue Cross had a contract to administer the program for HEW. In order to be reimbursed by HEW for health care rendered to medicare patients, PSGH must file cost reports with Blue Cross annually, listing all expenses incurred in rendering patient care for that year. The amount due the hospital annually from HEW is determined by multiplying these total health care expenses by the percentage of Medicare patient days to total patient days for that year. Appellant, as chief hospital administrator, was responsible for the filing of PSGH cost reports with Blue Cross, and did so annually. These cost reports, Forms 1563, 1562 and 1992 for fiscal year 1971 are the claimed false statements as to material fact forming the basis for Count Three of the indictment.

(523 F.2d at 774; A. 10)

* * *

The second transaction relied on by the government as reflecting non-reimbursable costs, those which were not legitimate hospital expenses, but nonetheless so reported to Blue Cross, involved the inter-relationship between Smith, his nephew Gregory Robinson, and

International Computer Sharing, Inc. (ICS). ICS was formed in March 1968, by Aspee Irani, a member of the PSGH Board of Trustees. In April 1968, PSGH entered into a contract with ICS to provide it with computer services. At this time Irani gave away his stock in ICS, but remained, for a salary, in a consultant status. It is doubtful that Irani ever lost control of ICS. The computers which ICS installed in the hospital were leased by it from IBM through another Irani concern, Irani and Associates, a consulting and engineering firm. During the time period in question, the PSGH account constituted ninety-five percent of ICS's business.

In the fall of 1968 several events took place, of which the order was in conflict in the trial testimony. Raynes, an IBM systems engineer, testified he provided to ICS and PSGH two computer programs only recently obtained by IBM. These programs, not yet in the IBM library, and not then in use within the Miami area, suited the hospital's needs. It was at that time IBM's policy to provide these programs without charge to concerns which leased their equipment from IBM. Raynes testified that when he delivered the programs to PSGH, the hospital did not have computer programs to perform the functions of the ones he delivered.

In October of 1968 ICS began paying Gregory Robinson, nineteen year old nephew of appellant, $2,600 per month for computer programs he allegedly sold to ICS, two of which performed the same functions as the ones delivered by Raynes. He was paid, in all, $67,000. The payments were completed in December,

1970, six months into the fiscal year 1971, which ended June 30, 1971. The evidence established that the programs Raynes delivered and the ones sold by Robinson are one and the same. Irani testified that the computer programs in question were bought from Robinson three or four months before they were delivered by Raynes from IBM, and that Robinson stated he had gotten them "from a friend". Raynes' testimony thus conflicts with that of Irani both as to the time periods involved and as to the order of events.

Appellant testified Robinson had approached him in September 1968, about selling the programs, and that he had directed him to Irani of ICS. Irani testified that the person he had given the ownership of ICS to had instructed him to check out Robinson's programs, that he had, and that he found them to fulfill the hospital's needs. Irani delivered checks from ICS, made out to Robinson, to the front desk at PSGH. Smith often cashed these checks, frequently endorsing Robinson's name on them.

(523 F.2d at 776-77; A. 14-16)

A few further facts are necessary in connection with the correctness of the Medicare form signed by Petitioner Smith, as it relates to the ICS transaction and the propriety of admission of all of the ICS evidence.

The day before trial began, defense counsel complained that the Government had not complied with the pre-trial discovery orders in supplying adequate information about an alleged $67,000 "kick-back" in connection with the hospital's computer service contract. The following colloquy resulted in an order for more particulars to enable defendant to prepare for trial:

THE COURT: So your position is that Mr. Smith in fact received $67,000.00 kick-back through the avenue of payments to his nephew by the computer?

MR. McCULLEY: Right.

MR. WEINSTEIN: He is accused of filing a false medicare report, *we would like to know where that is supposed to be included on these very thick cost report figures, why it is supposed to be an offense.*

In the first place we have serious doubts as to whether the court will admit it, whether it follows the rules of evidence where it is a payment from a fourth person to a fifth person.

THE COURT: Kick-backs very seldom go directly back to the individual. That does not have anything to do with the evidence.

MR. WEINSTEIN: They have to lay a foundation though, your Honor.

THE COURT: We will get to the evidentiary problem later but let us not begin to try the matter.

I think what you really want to know is where does that fit into the allegations in this indictment, what bearing if any does that have upon the particular matter in the essential elements of proof for the charge itself.

Is that what you are talking about now?

MR. WEINSTEIN: Specifically where it is on the form, whatpage (sic), what line.

THE COURT: As to the forms?

MR. McCULLEY: It is included in certain costs on this cost reimbursable matter and we can specify — *I thought the indictment would — no, it does not.*

THE COURT: Can you provide them with the information that the (sic) the seek so as to—

MR. McCULLEY: The specific line and schedule, yes, sir, your Honor.

THE COURT: So you can relate these monies to the particular line and schedule on the form that you provided?

MR. McCULLEY: Will you do it, then?

THE COURT: Will you, Mr. McCulley, do it?

MR. McCULLEY: We will do it within an hour. We do not have the auditor though.

THE COURT: You can do it before five o'clock today?

The "Government's Supplement Bill of Particulars Re. Counts I, II, and III", was handdelivered to defense counsel on 5 February. The following information was provided to describe the alleged false statement in connection with the ICS transaction (A. 35):

"Location of payments from Palm Springs General Hospital, Inc. of Hialeah to International Computer Sharing.

A. SSA Form 1562, Schedule A, line 1, Col. 2 entitled" Administration and other"

* * *

3) In FYE 6-30-71 the above figure is $1,394,245.00 and included therein are payments to International Computer Sharing."

Defense counsel vehemently objected to all the evidence concerning International Computer Sharing.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE HOLDING OF THE COURT OF APPEALS THAT THE DEFENDANT COULD BE CHARGED "AT THE DISCRETION OF THE PROSECUTION" WITH VIOLATION OF A GENERAL *FELONY* FALSE CLAIMS STATUTE WHERE THE PARTICULAR ACTS SPECIFIED IN THE INDICTMENT ARE A *MISDEMEANOR* UNDER THE LATER PROVISIONS OF THE SOCIAL SECURITY ACT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THS COURT AND AT LEAST TWO DECISIONS OF THE COURTS OF APPEALS ON THE SAME POINT.

ALTERNATIVELY, THIS HOLDING PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The defendant was convicted of a felony under Count III of the indictment for making a false statement to the government on a Medicare report in violation of 18 USC §1001, the general false claims statute. This particular offense is covered more specifically by a more recently enacted statute, 42 USC §408(c), which provides for punishment as a misdemeanor making "any false statement or representation of a material fact for use in determining rights to payment" under the Social Security Act.[2] Defendant moved to dismiss Count III and, at the time of argument on the motion for judgment of acquittal, specifically brought to the attention of the trial court that the conduct charged could be the misdemeanor specified in Section 408(c). The contention was renewed by the motion for judgment of acquittal made at the close of all of the evidence and also after the verdict. All of these motions were denied by the trial court. In rejecting the defendant's claim of error, the court below stated (523 F.2d at 780; A 23-24):

> It is established in the jurisprudence of this Circuit that, in a situation of overlapping offenses, prosecution may be brought under either statute *at the discretion of the prosecution. United States v. Chakmakis*, 5 Cir. 1971, 449 F.2d 315, 316. The inter-relationship of the identical statutes here in question was considered in *Chakmakis*. A doctor had been convicted of violating Title 18, Section 1001, for filing fraudulent applications for payment under provisions of the

[2]The government uses Section 408(c) in order to prosecute false statements under the Medicare program when it chooses this route, United States v. Cacioppo, 517 F.2d 22 (8th Cir. 1975), and has even prosecuted under both Section 408(c) and Section 1001 in the same Medicare case. United States v. Katz, 455 F.2d 496 (5th Cir. 1972), *cert.den.* 408 U.S. 923, *reh.den.*, 409 U.S. 899.

Social Security Act. He argued on appeal that he should have been charged under the more recently enacted misdemeanor provision, Title 42, U.S.C. Section 402(c) (*sic*). We stated:

> "[I]t is quite clear that the enactment of the later section did not repeal the former and that the facts of the alleged offense fell within the terms of either statute. Hence, the prosecution could have been brought under either, at the discretion of the prosecutor. *Bartlett v. United States*, 10 Cir., 1948, 166 F.2d 920, 926; *Hopkins v. United States*, 9 Cir., 1969, 414 F.2d 464; *Ehrlich v. United States*, 5 Cir., 1956, 238 F.2d 481, 485; *United States v. Cox*, 5 Cir., 1965, 342 F.2d 167, 171, cert. denied [sub nom.] *Cox v. Hauberg*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700." *Ibid.* at 316.

Accord, *United States v. Fournier*, 5 Cir. 1973, 483 F.2d 68; *United States v. Brown*, 9 Cir. 1973, 482 F.2d 1359, 1360. Binding precedent puts an end to this claim of error.

While the cases cited by the Court of Appeals do support this statement of law, we submit that it is contrary to the applicable decisions of this Court. In the alternative, we submit that this point has never been squarely settled by this Court; that it is a basic and important question of federal law; that it will continue to re-occur until and unless settled; and that the constitutionally correct decision is contrary to that reached by the Court of Appeals in this case and in the other cases relied upon for precedent.

We assume for the purpose of this argument that the Court of Appeals' reference to "overlapping offenses" means offenses whose elements are identical and not those situations where one offense contains one or more elements which differ from or are not contained within the other offense[3].

Our research indicates that the Court first considered the problem in a criminal context in the 1890 case of *United States v. Chase*, 135 U.S. 255, 10 S.Ct. 756, a prosecution under early postal obscenity statutes. On certified questions arising from motions in arrest of judgment, this Court held that the particularization in the statute of non-mailable matter prevented conviction for mailing matter which would *otherwise have been encompassed within the generality* of the statute. In so deciding, this Court said:

> It is an old and familiar rule that "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." Pretty v. Solly, 26 Beav. 610, per Romilly, M. R.; State v. Commissioners, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject which, standing alone, the general provisions would include. 135 U.S. at 260

[3]See, *Sansone v. United* States, 380 U.S. 343, 85 S.Ct.1004 (1965)

The same principle formed the basis of decision in *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797 (1904).

Later, this Court made clear that the words "same statute" could also be synonymous with "statutory scheme". Thus, in *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 52 S.Ct. 322, interpreting a specific prohibition against body arrest in the bankruptcy statutes, the Court said:

> In view of the general exemption of bankrupts from arrest under section 9a and the carefully guarded exception made by section 9b as to those about to leave the district to avoid examination, there is no support for petitioner's contention that the general language of section 2(15) is a limitation upon section 9(b) or grants additional authority in respect of arrests of bankrupts. General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260, 10 S.Ct. 756, 34 L.Ed. 117. Specific terms prevail over the general in the same *or another statute* which otherwise might be controlling. Kepner v. United States, 195 U.S. 100, 125, 24 S.Ct. 797, 49 L.Ed. 114, 1 Ann. Cas. 655; In re Hassenbusch (C.C.A.) 108 F. 35, 38; United States ex rel. Kelley v. Peters (D.C.) 166 F. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. Washington Market Co. v. Hoffman, 101 U.S. 112, 115, 25 L.Ed. 782; Ex parte Public Bank, 278 U.S. 101, 104, 49 S.Ct. 43, 73 L.Ed. 202. 285 U.S. at 207-208.

See also, *MacEvoy Co. v. United States*, 322 U.S. 102, 64 S.Ct. 890 (1944) (application of rule to civil cases).

In the case of *United States v. Robinson*, 142 F.2d 431 (8th Cir. 1944), the Court had occasion to consider a 10-year sentence imposed under a statute generally punishing the larceny of government property. The defendant argued that the most he could be sentenced for this particular act was the 3-year penalty for "stealing a property belonging to the Post Office Department". The Eighth Circuit granted arrest of judgment and ordered resentencing under the particular statute calling for the lesser penalty. In so deciding, the Court said (142 F.2d at 432):

> *So that, although the larceny of any property of the United States in general may be punished by ten years imprisonment, it is forbidden to impose more than three years for larceny of that particular United States property which belongs to the Post Office Department.* Elementally, the special stands against the general. That is, where there is a law against any stealing, and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception. The special mandate of section 190, forbidding

"more than three years" imprisonment for larceny of the particular property that is Post Office property, must therefore prevail over the ten year term permitted for larceny of United States property in general.

"It is an old and familiar rule that 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.'" United States v. Chase, 135 U.S. 255, loc.cit. 260, 10 S.Ct. 756, 757, 34 L.Ed. 117.

Or as stated in the briefer modern way:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." Ginsberg & Sons v. Popkin, 285 U.S. 204, loc.cit. 208, 52 S.Ct. 322, 323, 76 L.Ed. 704.

In United States v. Zenith Radio Corp., D.C. Ill., 12 F.2d 614, the court said at page 618:

"It is elementary that where there is, in an act, a specific provision relating to a particular subject, that provision must govern in respect to the subject as against general provisions in the act, although the latter, standing alone, would be

broad enough to include the subject to which the more particular provision relates. Endlich, Interpretation of Statutes, § 216; Swiss National Insurance Co. v. Miller, 53 App.D.C. 173, 289 F. 571, 576; Washington v. Miller, 235 U.S. 422, 428, 35 S.Ct. 119, 59 L.Ed. 295; U.S. v. Nix, 189 U.S. 199, 205, 23 S.Ct. 495, 47 L.Ed. 775; Townsend v. Little, 109 U.S. 504, 519, 3 S.Ct. 357, 27 L.Ed. 1012. *This rule is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision.*"

We find no evidence that the *Robinson* case has ever been overruled or superseded and, therefore, it is necessarily in conflict with the concept of "prosecutorial discretion" approved in the case at bar.

Another decision which we submit conflicts squarely in principle with "prosecutorial discretion" is *Shelton v. United States*, 165 F.2d 241 (D.C.Cir. 1947). The facts of that case seem to us strikingly analogous to those in the case at bar. Shelton had been convicted of a felony under the general perjury statute prevailing in the District of Columbia. The particular act constituting the perjury was a false statement in an application for a duplicate automobile title certificate. There was also a specific District of Columbia provision relating to "* * * a false statement with respect to liens in an application for certificate * * *" which was made a *misdemeanor*. In reversing the conviction, the Court of Appeals said (165 F.2d at 244):

We think that the above-quoted provisions of Sections 6 and 14 of the Lien Act apply to appli-

cations for duplicate certificates just as do the provisions of all the other sections of the Act.

The foregoing being true, the next question is whether the defendant's false oath as to liens may be prosecuted and punished under the general perjury statute. It is clearly within the statutory definition of perjury in that statute, quoted above. But there can be no question about the general rule that, absent extraordinary results of such construction, a specific later statute, rather than an earlier general one, applies to a given transaction described by both acts; i. e., generally by the earlier act and specifically by the later.

* * *

> The offense thus described in the Lien Act is a particular kind of perjury. Congress has provided a specific penalty, and a specific prosecutor, for the sort of perjury which consists of a false oath as to liens on an application for a certificate of title on a motor vehicle; and has designated that offense as one against the District of Columbia. The courts cannot ignore those provisions.

In spite of the assertions to the contrary by some of the courts of appeal[4] counsel for petitioner believe that this principle has never been passed upon by this Court since *Chase*.

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[4]Some of the courts of appeals have cited *United States v. Gilliland*, 312 U.S. 86, 61 S.Ct.518 (1941) as authority for a rule of prosecutorial discretion. As we read that decision this Court held only that certain provisions of the "Hot Oil Act" which were not shown to be overlapping, did not repeal the predecesor section to 18 U.S.C. 1001, and that there was no evidence of Congressional intent to cover the general false statement conduct by the particular provisions of that statute.

Berra v. United States, 351 U.S. 131, 76 S.Ct. 685 (1956), was an appeal from an income tax conviction under the Internal Revenue Code of 1939. Under that code, there were overlapping statutes relating to the act of willfully filing a false and fraudulent return with intent to evade tax, viz., §145(b), a felony section and §3616(a), an *earlier enacted* misdemeanor section. Berra contended that he should have been entitled to a lesser included offense instruction, a contention this Court rejected because it found no element present in one section not present in the other. In dissenting, Justice Black said that the Court should have, on its own motion, remanded the case for resentencing under the misdemeanor section (a contention not made by the defendant in that case). He thought so because he believed there was a constitutional abhorrence of the concept of "prosecutorial discretion".[5]

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[5]"The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because "the Government may choose to invoke either applicable law," and "the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor." Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly.

Here, however, under the Court's opinion and the Government's argument, two statutes proscribe identical conduct and no 'different proof' was required to convict petitioner of the felony than would have been required to convict him of the misdemeanor. The Government's whole argument rests on the stark premise that Congress has left to the

(Footnote Continued on Next Page)

Following the publication of Justice Black's dissent, numerous challenges were made to convictions of defendants under the old felony section on indictments charging the filing of a false income tax return. *Costello v. United States*, cert. granted, 352 U.S. 988; *Achilli v. United States*, 353 U.S. 373 and *Binion v. United States* and *Costello v. United States* (bail application), 352 U.S. 1028.

In *Achilli*, the Court decided the question insofar as it involved tax evasion convictions under the 1939 Code; it held that the felony provisions prevailed. It reached this conclusion, however, *only by finding that the misdemeanor (§3616(a)) had been repealed by implication.*

> The evolution of those sections makes clear that by the time the unconfined language of §3179 became §3616(a) of the 1939 Code, its scope had been shrunk by a series of specific enactments that had the potency of implied repeals. Due regard for appropriate statutory constructions calls for such a conclusion in order to harmonize an

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(Footnote Continued from Preceding Page)

district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.

A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v Hopkins, 113 US 356, 370, 30 L ed 220, 226 6 S Ct 1064." 351 U.S. at 138-139.

> earlier, generalized statute with later *ad hoc* enactments expressly directed to the collection of income taxes. 353 U.S. at 379.

We submit that the courts of appeal have overlooked that the opinion in *Achilli* implied recognition and approval by this Court of the principle set forth in Justice Black's dissent in *Berra*. If this Court had believed—as squarely held by the court of appeals in this case—that the prosecution could be brought under either section at the discretion (or whim) of the prosecutor, then there would have been no reason or justification whatever for this Court's expenditure of judicial labor to find implied repeal of the misdemeanor section, nor would the law have had to suffer the embarrasment of finding dozens of people in jail under a section which this Court said had been repealed long before. Rather, this Court would have said merely that the government had the power to prosecute offenders under either section at its discretion.

In the case at bar, certain facts are beyond argument:

1) The section under which the petitioner was convicted, 18 U.S.C. §1001, is the general false claim statute, which existed in one form or another since shortly after the Civil War. The present statute derives directly from an Act of March 4, 1909, c.321 §35, 35 Stat. 1075, which was itself derived from earlier law—RS §5438.

2) The Social Security Act, and its misdemeanor penalty provision, was enacted on August 13, 1935.[6]

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[6] 49 Stat. 620, 625. It was amended many times thereafter, although the substance has not been changed.

We have been unable to find any legislative history which pinpoints the intent of Congress in enacting the false statement section of the Social Security Act, nor the various extensions and expansions thereafter; however, we suggest that it is most reasonable to assume that, at the time of the first enactment, and continually thereafter, Congress was well aware of the general felony false claim statute,[7] and intended that a false Social Security claim should be punished less severely than a false claim generally.[8] Otherwise, one can find no purpose to be served by the misdemeanor section.

The offense of which the petitioner was convicted is alleged to have taken place on January 21, 1972. At that same time, Congress was working on a revision of the Social Security law, including the penal sections which were, in fact, enacted as Public Law 92-603, effective October 30, 1972, 86 Stat. 1359. A brief statement in the Committee Reports does give some clue to the intent of Congress, not only with respect to the penalty provision, but precisely the kind of conduct that it was supposed to cover:

> "Penalty for fraudulent acts under medicare and medicaid.

[7]In 1935, the section was 18 U.S.C. § 80.

[8]The August 28, 1958 amendment, 75 Stat. 1034, for the first time explicitly stated that a person making a false statement in various kinds of claims under the Social Security Act "shall be guilty of a misdemeanor." This appears to be the first time Congress particularlized such offenses as "misdemeanors". The House and Senate reports state only that the purpose of the amendment was to clarify and bring up-to-date the penalty provisions. 1958 U.S. Code Congressional and Administrative News, 4282.

> Present penalty provisions [i.e., those existing in January of 1972] relating to the making of a f a l s e statement or representation of a material fact *in any application for medicare payments* would be broadened to include the soliciting, offering, or acceptance of kickbacks or bribes, including the rebating of a portion of a fee or a charge for a patient referral, by providers of health care services. *The penalty for such acts would be imprisonment up to one year*, a fine of $10,000, or both. Similar penalty provisions would apply under medicaid.
>
> Anyone who knowingly and willfully makes, or induces the making of, a false statement of material fact with respect to the conditions and operation of a health care facility or home health agency in order to secure medicare or medicaid certification of the facility or agency, would be guilty of a misdemeanor punishable by up to 6 months' imprisonment, a fine of not more than $2,000, or both." 1972 U.S. Code, Congressional & Administrative News, p. 5007.

Thus considered, we have no less than the statement of Congress itself that *the particular conduct for which the Petitioner* was convicted of a felony, was intended by that body to be a misdemeanor.

We respectfully suggest that this is an important unsettled question as to which there are conflicts between

the circuits and in which, perhaps more important, the Court of Appeals has wrongly construed the applicable decisions of this Court.[9]

If in the case of overlapping statutes[10]—as opposed to lesser included offenses—the vast difference in consequences (disbarment, loss of civil rights, length of sentence and probation, etc.) between conviction of felony and misdemeanor are to be left not to the law, or to the courts, but to the discretion of the prosecutor,[11] then this Court should say so. On the other hand, if law and not human discretion is paramount, then this Court should rectify the constitutional error existing in the decision below.

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[9]We also suggest that a correct statement of the rule of this Court may be found in *Bell vs. United States*, 349 U.S. 81, 75 S.Ct. 620 (1955), where in deciding whether a particular act constituted single or multiple offenses, this Court said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." 349 U.S. at 83.

[10]Apparently the government was more concerned with the naked concept of prosecutorial discretion in the case at bar than was the Court of Appeals itself. Thus, the government argued in the alternative that a different proof was required for conviction under 18 USC §1001 than for conviction of the specifically described misdemeanor (government's brief p. 29) and that it had assumed and carried "the extra burden of proof". The Court of Appeals did not pass upon this contention, but had it agreed, the decision would have been contrary to that of the Eighth Circuit in *United States v. Cacioppo*, 517 F.2d 22 (8th Cir. 1975) which holds that the misdemeanor, 42 USC §408(c), implies that the act be done "knowingly and willfully" and also contrary to *United States v. Carey*, 475 F.2d 1019 (9th Cir. 1975), which holds that section 408(c) is not a lesser included offense within section 1001.

[11]Some abuses of prosecutorial discretion were described recently in Newsweek, December 1, 1975, pages 113-14 (A 37).

II

AFFIRMANCE OF A CONVICTION FOR MAKING A FALSE STATEMENT WHEN THAT WHICH THE GOVERNMENT CONTENDS WAS FALSE WAS ACCURATE AND IN COMPLETE ACCORD WITH THE INSTRUCTIONS OF THE GOVERNMENTAL AGENCY TO WHICH IT WAS SUBMITTED IS A DEPRIVATION OF DUE PROCESS OF LAW.

AN IMPORTANT QUESTION OF INTERPRETATION OF THE MEDICARE REGULATIONS IS PRESENTED WHERE THE COURT BELOW REQUIRED INFORMATION ON A MEDICARE FORM AT TOTAL VARIANCE WITH SOCIAL SECURITY ADMINISTRATION INSTRUCTIONS.

When the government filed its "Supplement Bill of Particulars", it bound itself to the position that the false statement it accused Petitioner of making in connection with the ICS transaction was located on Social Security Administration Form 1562, Schedule A, Line 1, Column 2 (A. 35); in effect, the government said that the figure there stated—$1,394,245—was deliberately incorrect and that it should have been $15,600 less. $15,600 is the amount paid by ICS to Petitioner's nephew during the hospital's fiscal year 1971. (523 F.2d at 777, n.13; A. 15).

The interpretation of the court below as to how a Medicare cost report must be filled in, as well as that of the Department of Justice, is completely at variance with the instructions of the Social Security Administration for preparation of a cost report and the application of these instructions by Medicare auditors. Petitioner was convicted for signing a Medicare report which was prepared, at least as to the specific figure the government contends was erroneous and fraudulent, completely in accord with the requirements of the Social Security Administraton. Whether or not any other figures on the Medicare reports were in error, the one the government focused on in its prosecution was correct.

Schedule A of Social Security Administration form 1562 contains six columns (A. 35). There is no dispute that "Schedule A, line 1, column 2 is the place for showing direct expenses of the hospital, other than salary, as shown in the hospital's books", and the court below specifically so found (523 F.2d at 779). This is the Social Security Administration's instruction for completing a cost report

(1 CCH, Medicare and Medicaid Guide, ¶6490; A. 31).[12] Column 5 of Schedule A is for adjustments to expenses which are made on Schedule A-5. Schedule A-5 includes adjustments to remove expenses which are specifically unallowable under the Medicare Program (1 CCH, Medicare and Medicaid Guide, ¶6515). Column 6 on Schedule A represents the adjusted expenses, and this is the figure used for Medicare reimbursement purposes. The Social Security Administration has detailed regulations and guidelines for adjusting out expenses which are not allowable under Medicare, including payments to so-called "related organizations" and kickbacks or rebates to hospital officials (20 CFR §§405.425, .427; 1 CCH, Medicare and Medicaid Guide, ¶¶5676-5720, ¶5568).

The Fifth Circuit thought that the $1,394,245 figure was wrong and would support a criminal conviction because it was fraudulent;[13] the Justice Department took the position the figure was erroneous because part of it alleg-

[12]On direct examination, the director of Blue Cross of Florida's Provider Reimbursements testified that when cost reports are audited, the auditors make sure that the information reported in the Provider's books and records is the same information that is on the cost report.

[13]523 F.2d at 779-80: "The figure purports to be hospital expenses. The amount falsely included is not a hospital's expense, *even though shown in the hospital's books as such.* In other words, appellant's personal building costs and diaper service expense as well as the ICS transaction were incorrectly shown as expense on the hospital's books. They were therefore necessarily incorrectly represented in the total figure of $1,394,245. The figure was indeed false, as the supplemental bill of particulars asserted."

edly was returned to Petitioner Smith;[14] Medicare auditors decided that the figure was too high because it included payments to a related organization.[15] Assuming the auditor was correct, there was nothing wrong with the $1,394,245 figure and an adjusting entry should have been made in column 5, Schedule A to remove the unallowable costs. Assuming the Department of Justice was correct, the figure in Schedule A, line 1, column 2 would still be the same, and an adjustment would be made in column 5 to eliminate any rebates or kickbacks. The point is that the hospital was required to put down on Schedule A, line 1, column 2 exactly the figure which its own books contained, and it did that. If not all of those costs were allowable under the Medicare program, the unallowable portion should have been removed by adjusting entries in column 5.

The prosecutors and the appellate court did not understand how the Medicare cost reimbursement system works and how a cost report is required to be prepared. The figure $1,394,245 on SSA Form 1562, Schedule A, line 1, column 2 which the government contended was a Section 1001 false statement was not false at all. It was the expense shown by the hospital's books, including the amounts actually paid by the hospital to ICS. If part of the payments to ICS were in fact not reimbursable under the Medicare

[14]In footnote 14 of its brief in the Fifth Circuit, the Justice Department stated:

> "The government did not contend below, and is not contending here, that the computer service costs included on the cost report were false because they were made to a related organization. They were false because part of them were returnd to defendant."

[15]Blue Cross Auditor Joseph Birdsong specifically testified that a portion of the computer cost was disallowed because the hospital and ICS were related organizations, and not because of any contention that Petitioner actually received any of the money.

program, the system established by the Social Security Administration required that an adjusting entry be made to remove the unallowable portion in column 5 of Schedule A. But Petitioner was not accused of: (i) making an error in column 5; (ii) not making a proper adjustment in column 5; or (iii) of falsely stating the amount used for reimbursement in column 6. The prosecutors, trial court, and court of appeals united in convicting Petitioner of something which is no crime at all. Had the hospital's cost report contained a figure other than the $1,394,245 shown on its books, it would have been erroneous.[16]

Under the system of cost reporting established by the Social Security Administration, Form 1562, Schedule A starts out with the actual expenses of a hospital as shown on the hospital's books. Detailed bookkeeping standards have not been imposed by the federal government, except with respect to the kind of documentation of expenses which is maintained. The Social Security Administration has provided on its cost reporting forms specific places to adjust out of the expenses shown on the hospital's books any costs which are not reimbursable under Medicare. The appellate court in effect has established federal standards for hospital bookkeeping, and requires that every hospital maintain its books so that no kickbacks, allegedly fraudulent, or other unallowable costs show up on the books—as opposed to the "bottom line" figures on the cost report

[16]Because of the complexity of the requirements for completing a cost report, Petitioner submitted affidavits of experts on the subject to the trial court in support of post trial motions (A. 42-49) and also relied upon them in the appellate court, all to no avail. (The $13,000 figure discussed in these affidavits should have been the $15,600 figure used in the opinion in the court below, but this makes no difference for purposes of this discussion.)

used for reimbursement. The interpretation given the cost reporting system by the Fifth Circuit is at variance with administrative requirements,[17] and will result in a great deal more federal regulation than was intended by Congress and those who administer the Medicare system.

The court interpretations of the requirements for completing a Medicare cost report at variance from those of the government agency to which the report was submitted deprived the Petitioner of due process of law, as did the requirement that he defend the case based upon evidence at variance from the bill of particulars which set forth his alleged false statement.

[17]See, *Patterson v. Lamb*, 329 U.S. 539; *Youakim v. Miller*, —— U.S. ——, 44 L.W. 4467 (3/31/76), and cases cited therein.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 74-2343

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OAKLEY G. SMITH,
Defendant-Appellant.

Nov. 17, 1975

The United States District Court for the Southern District of Florida, at Miami, Joe Eaton, J., found defendant, the president of a hospital and the chairman of its board of trustees, guilty of willfully making false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare, and he appealed. The Court of Appeals, Simpson, Circuit Judge, held that defendant was properly indicted by a validly constituted grand jury; that he received a fair trial at which sufficient evidence was presented to warrant the jury's lawfully returning its verdict of guilty; that the verdicts rendered were not reversibly inconsistent, even though defendant was acquitted on eight other counts; and that defendant presented no evidence to establish that he was the target of invidious prosecutorial discrimination.

Affirmed.

1. Fraud—68.10(2)

As used in federal statute which prohibits, inter alia, the knowing and willful misrepresentation of a material fact within the jurisdiction of a federal department or agency, the term "knowingly," requires only that the defendant acted with knowledge, and the term "willfully" means that the defendant acted deliberately and with knowledge. 18 U.S.C.A. § 1001.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law —1144.13(3)

On the appeal of a conviction, the Court of Appeals examines the sufficiency of the evidence in light most favorable to the government in substantiation of the charge.

3. Criminal Law —552(3)

On the appeal of a conviction in a case based on circumstantial evidence, the responsibility of a Court of Appeals is to determine whether reasonable minds could conclude that the evidence presented at trial was inconsistent with the hypothesis of the accused's innocence.

4. Criminal Law —1159.2(7)

It is for the jury to determine the guilt or innocence of a defendant; an appellate court should not interfere unless it concludes that the jury must necessarily have had a reasonable doubt.

5. Criminal Law —556

Government is not to be held accountable for the testimony of each of its witnesses.

6. Criminal Law —549

Testimony need not be received "in a vacuum."

7. Fraud —69(1)

In prosecution for willfully making a false statement as to a material matter within the jurisdiction of a federal department or agency, the defense of reliance on expert advice, to be effective, must establish good faith reliance on the expert coupled with full disclosure to the expert. 18 U.S.C.A. § 1001.

8. Fraud 69(5)

In prosecution of hospital's president for willfully making false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare, the evidence as to each of three financial transactions sufficed for the jury to find that defendant had knowledge that his personal expenses and those not of the hospital were included within the general hospital accounts as transcribd to medicare forms signed by him. Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.; 18 U.S.C.A. § 1001.

9. Indictment and Information —60, 71.2(4)

To ensure that an indictment is legally sufficient, it must allege essential elements of the offense so as to inform the defendant of the charges he must meet and it must be at least specific enough that a verdict under it will protect the defendant from double jeopardy.

10. Indictment and Information —55

Validity of an indictment is determined by practical, not technical, considerations.

11. Indictment and Information —71.4(4)

Indictment charging hospital president with willfully making false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare was not so vague as to fail to inform defendant of the nature of the charges he had to meet in order properly to prepare a defense, where it stated the location of the false statements and the theory under which the Government would argue them to be false, particularly where the defense sought by motion and received extensive bills of particulars which detailed the underlying fraudulent acts. Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.; 18 U.S.C.A. § 1001.

12. Fraud —69(2)

In prosecution of hospital president on charge of willfully making false statements as to a material matter within jurisdiction of the United States Department of Health, Education and Welfare, no fatal variance existed

between the allegations and proof in the case. Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.; 18 U.S.C.A. § 1001.

13. Criminal Law —29

In a situation of overlapping offenses, prosecution may be brought under either statute at the discretion of the prosecutor.

14. Constitutional Law —257

Hospital president, who was charged with the felony of willfully making false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare, was not denied due process by reason of the fact that the Government could have elected to prosecute him under overlapping misdemeanor statute. Social Security Act, §§ 202(c), 208, 208(c), 42 U.S.C.A. §§ 402(c), 408, 408(c); 18 U.S.C.A. § 1001.

15. Grand Jury —2½

Grand jury which returned indictment was not unconstitutionally composed even though it was drawn from a jury wheel filled in December of 1968, and even though, at the time of the indictment, the wheel was four years and four months old, despite contention that young adults and Cuban Americans were thereby excluded.

16. Criminal Law —878(4)

Consistency in the verdict is not a requirement for conviction in courts of the United States.

17. Criminal Law —569

Since medicare form mistakes are not, without more, criminal acts, defendant hospital president, who was indicted for willfully making false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare, failed to show that he was the subject of an illegal discriminatory prosecution. Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.; 18 U.S.C.A. §1001.

18. District and Prosecuting Attorneys —8

Decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor, and such discretion has been curbed by the judiciary only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights.

Paul A. Louis, William A. Meadows, Jr., Philip T. Weinstein, Miami, Fla., for defendant-appellant.

Ronald Rose, Gary L. Betz, Sp. Attys., Dept. of Justice, Miami, Fla., Thaddeus B. Hodgdon, Crim. Div., App. Section, Dept. of Justice, Washington, D.C. for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BELL, DYER and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Oakley G. Smith was charged in a nine count indictment with having violated three federal statutes, one count relating to each offense for each of three successive years. Counts One through Three alleged appellant had, in violation of Title 18, U.S.C. Section 1001, made false statements as to a material matter within the jurisdiction of the United States Department of Health, Education and Welfare; Counts Four through Six charged him with making and subscribing to false income tax returns for an exempt organization, Palm Springs General Hospital, in violation of Title 26, U.S.C. Section 7206; and Counts Seven through Nine charged him with willfully attempting to evade personal income tax, contrary to the provisions of Title 26, U.S.C. Section 7201.[1] Appellant was found guilty, following a jury trial, on Count Three, willfully making false statements in a matter within the jurisdiction of H.E.W. in the fiscal year 1971.[2] He was found not guilty on the other eight counts. Post-trial motions for judgment of acquittal (renewing motions made at the close of the

[1]The time periods involved did not precisely overlap for each crime charged, due to different fiscal years. Thus the Section 1001 violations were for Medicare fiscal years ending June 30, 1969 through 1971. The tax years of Palm Springs ended September 30, 1969, 1970 and 1971. Smith's personal income tax returns were filed on a calendar year basis, the tax years involved ending December 31, 1969, 1970 and 1971.

[2]Title 18, Section 1001, provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

government's case and again at the close of the evidence), for new trial and in an arrest of judgment were denied; judgment of conviction and sentence[3] followed. Smith appeals from the judgment and sentence.

Appellant urges reversal of his conviction on several grounds: (1) that the trial judge erred in not granting defendant's motions for acquittal because the evidence was insufficient to support the verdict; (2) that Count Three of the indictment should have been dismissed as being vague and indefinite, and that the proof was at variance with the false statement alleged; (3) that the appellant was denied due process by the prosecution's charging him with a felony in that the conduct for which he is charged is more specifically proscribed by a misdemeanor statute; (4) that the grand jury which returned the indictment was unconstitutionally composed; (5) that the jury's verdict was inconsistent, and (6) that the appellant was the target of discriminatory prosecution. Our examination of the record in light of the points raised by appellant convinces us that for the reasons cited herein they are without substance. We affirm.

[1] The primary contentions pressed upon us by the appellant are questions relating to the sufficiency of the evidence. Section 1001 requires the "knowing and willful" misrepresentation of a material fact within the jurisdiction of any department or agency of the United States. "Knowingly" as used in Section 1001 requires only that the defendant acted "with knowledge". United States v. Mekjian, 5 Cir. 1975, 505 F.2d 1320, 1324; McBride v.

[3]The sentence was to three years confinement and a fine of $7500, with six months only of confinement, the balance probated under the split sentence provision of Title 18, U.S.C. Section 3651.

United States, 5 Cir. 1955, 225 F.2d 249. "Willfully" means the defendant acted "deliberately and with knowledge". United States v. Mekjian, supra; United States v. Parten, 5 Cir. 1972, 462 F.2d 430; McBride v. United States, supra. Appellant contends the evidence in this case is insufficient to support the jury's finding of the requisite mens rea. This requires a detailed recitation of the facts of the case, as shown by the evidence.

I. SUFFICIENCY OF THE EVIDENCE

[2-4] We examine the sufficiency of the evidence in the light most favorable to the government in substantiation of the charge. Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704; United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825; Jones v. United States, 5 Cir. 1968, 391 F.2d 273, 274. "All reasonable inferences and credibility choices as will support the jury's verdict of guilty must be made". United States v. Black, 5 Cir. 1974, 497 F.2d 1039, 1041. Our responsibility in a case based upon circumstantial evidence is to determine whether reasonable minds could conclude that the evidence presented at trial is inconsistent with the hypothesis of the accused's innocence. United States v. Black, supra; United States v. Amato, 5 Cir. 1974, 495 F.2d 545; United States v. Edwards, 5 Cir. 1974, 488 F.2d 1154; United States v. Fontenot, 5 Cir. 1973, 483 F.2d 315, 321; United States v. Warner, supra. It is for the jury to determine the guilt or innocence of a defendant; an appellate court should not interfere unless it concludes that the jury must necessarily have had a reasonable doubt. United States v. Black, supra; United States v.

Fontenot, supra; United States v. Warner, supra. These principles guide us in our consideration of the facts as established by the evidence.

The appellant, Oakley G. Smith, was president and chairman of the Board of Trustees of Palm Springs General Hospital at Hialeah, Florida (PSGH, or the hospital). PSGH was a non-profit tax-exempt institution, which participates as a "provider" hospital in the Medicare program. Medicare is a program of the United States Department of Health, Education and Welfare (HEW), more specifically, the Social Security Administration.[4] Blue Cross had a contract to administer the program for HEW.[5] In order to be reimbursed by HEW for health care rendered to medicare patients, PSGH must file cost reports with Blue Cross annually, listing all expenses incurred in rendering patient care for that year. The amount due the hospital annually from HEW is determined by multiplying these total health care expenses by the percentage of Medicare patient days to total patient days for that year. Appellant, as chief hospital administrator, was responsible for the filing of PSGH cost reports with Blue Cross, and did so annually. These cost reports, Forms 1563, 1562 and 1992 for fiscal year 1971 are the claimed false statements as to material fact forming the basis for Count Three of the indictment.

Testimony established that Smith knew the general method by which the Medicare reimbursement program worked, and had in fact been instrumental in bringing the program to the hospital. Smith made it a practice to retain complete financial control of the hospital. The jury had

[4]Title 42, U.S.C. Section 1395 et seq. (1970).

[5]Blue Cross of Florida, Inc., is a private insurance carrier.

testimony before it which indicated that Smith knew that any distortion in the hospital's books would cause a corresponding distortion of the Medicare reports. The critical question of proof in this case is therefore the extent of Smith's knowledge that improper costs were included in the hospital's books as reported to Medicare.

The prosecution, at trial, focused its proof on three highly irregular transactions, each of which was reflected in the hospital's total costs as reported to Blue Cross. Two of these expenses are argued by appellant to have been the result of a "mistake" on the part of Smith or that of hospital employees. The other expense is characterized by Smith as reflecting a legitimate hospital expense. We hold here that the jury had evidence before it justifying a finding that each transaction was not a legitimate patient care expense, or mistake, but was instead the result of an intentional act on Smith's part.[6]

In October 1968, appellant began the remodeling of his home on Miami Beach. He hired an employee of the hospital to be foreman of the work and to order supplies through the hospital.[7] Arango, a government witness, the comptroller of the hospital, testified that early in 1969 he noticed invoices coming to the hospital with Smith's Miami

[6]Although determining that sufficient evidence was present for the jury to find appellant knew improper costs to be reflected in the Medicare forms with respect to each transaction alleged, we nevertheless note that if there had been sufficient evidence to prove mens rea in connection with any or either of the improper expenses alleged, sufficient basis would exist for affirmance of the conviction. Crain v. United States, 1896, 162 U.S. 625, 636, 16 S.Ct. 952, 955, 40 L.Ed. 1097, 1100; United States v. Edmondson, 5 Cir. 1969, 410 F.2d 670, 673 n. 6, cert. denied, 396 U.S. 966, 90 S.Ct. 444, 24 L.Ed.2d 430.

[7]By ordering supplies through the hospital Smith could take advantage of discounts and wholesale prices available to PSGH which he would not otherwise be able to obtain.

Beach home shown as the delivery address of the goods. When he inquired as to these invoices Smith told him to pay them, but to "segregate" those expenses from other hospital costs. Arango did not separate out the Smith remodeling invoices, and they were charged to the hospital accounts as ordinary expenses. Checks to pay these, and all hospital expenses, together with the respective invoices,[8] were taken to Smith to sign, in accordance with appellant's practice of signing all the general account checks of the hospital, in order to keep tight control over the various expenses. At the top right corner of the checks was a "stub" portion indicating the account to which expenses were charged by number, and sometimes by name also. Smith signed checks which paid for his home remodeling, as well as those for all other hospital expenses.

The establishment of an open end loan from the hospital to Smith is argued as an explanation for the erroneous expensing of appellant's personal costs to the hospital accounts. There was apparently mention of a loan as early as Arango's confrontation of Smith with the invoices in the incident described above. The minutes of two of the Board of Trustees' meetings contained authorization for a loan to Smith. The government, however, presented evidence which showed the minutes to be unreliable.[9] The hospital had at various times made loans to hospital employees, loans which were properly reflected in the books

[8]In some instances, the delivery address of invoices for goods used in the remodeling of Smith's home was "scratched" out.

[9]I. e. Mr. Raymond Woody, a Trustee at that time, is recorded as present on February 19, 1970, the date Smith's loan was allegedly authorized to be increased, although he was not present at that meeting. Throughout the minutes of the Trustees' meetings he is recorded as present and taking part, yet he testified to having attended only two meetings, one in 1967, and one in 1973.

and not charged to the general hospital accounts reported to Blue Cross. The account books of the hospital did not reflect a loan to Smith until September of 1972, by which time the auditor for Blue Cross had discovered that the remodeling costs of Smith's home had been carried on the hospital books as reimbursable expenses, and raised this issue with Arango. Two witnesses, one an accountant with PSGH who handled accounts receivable, the other an accountant who assisted an independent CPA with auditing the hospital's books, both employed between the time the loan was originally said to have been made and September 1972, testified they were not aware of any loan.

[5, 6] The home remodeling costs of appellant were reflected for a two and one half year period in the general hospital expenses as reported to Blue Cross. Arango's testimony that Smith told him to "segregate" the home remodeling invoices from the others, four months or so after the start of the remodeling project, in no way compelled the jury to discount the import of the other evidence. The government is not to be held accountable for the testimony of each of its witnesses. United States v. Gordon, 5 Cir. 1969, 410 F.2d 1121. It is not necessary that testimony be received "in a vacuum". See Cohen v. United States, 5 Cir. 1966, 363 F.2d 321, 327. Loans to other employees during this time period were properly identified on the PSGH books. Auditors from the Internal Revenue Service and Blue Cross were not told of the existence of any loan to Smith during this entire time period, despite extensive and almost constant audits, until after they had independently discovered the irregularity. Members of the hospital staff "in a position to know" were unaware of a loan. Forman, a CPA and the hospital's external auditor,

did not know of the existence of a loan, nor did his assistants. The Board of Trustees' minutes argued by appellant to show the existence of a loan are not convincing, since they were proven to be incorrect in several particulars. Additionally, because of both his position as head of the hospital, and his family ties, the appellant was in a position to control the Board of Trustees.[10] From the evidence presented the jury had an ample basis for concluding that appellant knew full well that the remodeing expenses for his home were listed on the hospital's account books as general hospital expenses.

The second transaction relied on by the government as reflecting non-reimbursable costs, those which were not legitimate hospital expenses, but nonetheless so reported to Blue Cross, involved the inter-relationship between Smith, his nephew Gregory Robinson, and International Computer Sharing, Inc. (ICS). ICS was formed in March 1968, by Aspee Irani, a member of the PSGH Board of Trustees. In April 1968, PSGH entered into a contract with ICS to provide it with computer services. At this time Irani gave away his stock in ICS, but remained for a salary, in a consultant status. It is doubtful that Irani ever lost control of ICS. The computers which ICS installed in the hospital were leased by it from IBM through another Irani concern, Irani and Associates, a consulting and engineering firm.[11] During the time period in question, the PSGH account constituted ninety-five percent of ICS's business.

[10]The Board of Trustees of PSGH between 1968 and 1971 consisted of the appellant, Oakley Smith, his wife, Patricia Smith; his nephew, William Robinson; Raymond Woody, who attended no meetings during the years involved (although often listed as present and participating); Edward Santamaria, who resigned in September 1968, shortly before the loan is asserted to have been taken out; and lastly Aspee Irani, a person deeply involved in a second transaction to be discussed infra.

In the fall of 1968 several events took place, of which the order was in conflict in the trial testimony. Raynes, an IBM systems engineer, testified he provided to ICS and PSGH two computer programs only recently obtained by IBM. These programs, not yet in the IBM library, and not then in use within the Miami area, suited the hospital's needs. It was at that time IBM's policy to provide these programs without charge to concerns which leased their equipment from IBM. Raynes testified that when he delivered the programs to PSGH, the hospital did not have computer programs to perform the functions of the ones he delivered.

In October of 1968 ICS began paying Gregory Robinson, nineteen year old nephew of appellant $2,600 per month for computer programs he allegedly sold to ICS, two of which performed the same functions as the ones delivered by Raynes.[12] He was paid, in all, $67,000. The payments were completed in December 1970, six months into the fiscal year 1971[13] which ended June 30, 1971. The evidence established that the programs Raynes delivered and the ones sold by Robinson are one and the same. Irani testified that the computer programs in ques-

[11]Still another Irani concern, Irani and Castanon, an "architectural and design" corporation, designed PSGH.

[12]The programs in question are an "accounts receivable" program and a "patient billing" program. There was some testimony that three programs had been sold ICS by Robinson, but neither the identity, nor the existence, of the third program was ever established.

[13]$15,600 or $2,600 per month for six months, is the amount of money paid to Robinson during the hospital's fiscal year 1971, and the amount reflected in the medicare reports.

tion were bought from Robinson three or four months before they were delivered by Raynes from IBM, and that Robinson stated he had gotten them "from a friend". Raynes' testimony thus conflicts with that of Irani both as to the time periods involved and as to the order of events.

Appellant testified Robinson had approached him in September 1968, about selling the programs, and that he had directed him to Irani of ICS. Irani testified that the person he had given the ownership of ICS to had instructed him to check out Robinson's programs, that he had, and that he found them to fulfill the hospital's needs. Irani delivered checks from ICS, made out to Robinson, to the front desk at PSGH. Smith often cashed these checks, frequently endorsing Robinson's name on them.

It was the government's contention that not all the money the hospital paid ICS, reflected on the Medicare report, was a legitimate hospital expense, because that money necessarily included the fraudulent ICS—Robinson transaction.[14] The jury had before it ample evidence supporting the correctness of this contention.

The jury heard testimony from which it could conclude that ICS was paying Robinson for programs acquired free from IBM through Raynes. Smith was shown to know of the ICS-Robinson arrangement. In fact he testified that Robinson approached him about the deal. He personally cashed Robinson's checks, so whether or not Robinson

[14]The trial judge instructed the jury that this was not a kick back case:

> "[T]he Government's position is that Mr. Smith knew what the full amount paid to the computer service was not, in fact, for the computer service for patient care, not that Mr. Smith was getting any money out of that . . ."

ultimately received the money, it was clear that Smith knew the amount involved and was aware of the identity of the participants. Smith knew also that in excess of 25% of the amount PSGH paid ICS for computer services eventually was reflected in the checks to Robinson. Weighing the surrounding circumstances, the money involved, the business connections and arrangements of the parties, the kinship and close financial relationship between Smith and Robinson, the direct and circumstantial evidence before the jury warranted a conclusion that Smith knew of the fraud inherent in the payments to Robinson, and therefore knew that not all the money paid ICS was a legitimate expense of the hospital as he knew it was reported to Blue Cross.

The third action by the appellant relied upon by the government as unlawfully reflected by the medicare cost reports is a home delivery diaper service received by Smith and paid for by the hospital from November 1970, through June 1971. Appellant urges that the diaper service was intended to be handled as an employee's fringe benefit. It was not charged to the fringe benefit account, however, but was paid for through the commercial linen account, a cost set forth in the Medicare total operating expenses form. No other employees had access to a diaper service as a fringe benefit. These checks, to pay for the service, were signed by appellant in the manner of all the other hospital expense checks already mentioned.

Whatever appellant's original intent, the diaper service was not handled as a fringe benefit on the hospital books. The jury possessed sufficient evidence to determine that Smith, because of his practice of signing all checks to keep tight control of hospital costs, knew that the diaper

service was being charged to commercial accounts of the hospital, and that he therefore had knowledge that the Medicare reports contained false information as to the diaper service expenses.

[7, 8] It is no defense for appellant to assert, as he does, that he relied upon the expert advice of his CPA, Forman, before he signed the Blue Cross forms in question. The reliance defense, to be effective, must establish good faith reliance on an expert coupled with full disclosure to that expert. Bursten v. United States, 5 Cir. 1968, 395 F.2d 976; United States v. Cox, 6 Cir. 1965, 348 F.2d 294; United States v. Baldwin, 7 Cir. 1962, 307 F.2d 577, cert. denied, 1963, 371 U.S. 947, 83 S.Ct. 501, 9 L.Ed.2d 497. The evidence as to each of these financial transactions sufficed for the jury to find Smith had knowledge that his personal expenses and those not of the hospital were included within the general hospital accounts as transcribed to the Medicare forms. Claimed negligence on the part of his CPA in failing to discover these irregularities is irrelevant. Smith's reliance could not be in good faith if he had knowledge contrary to the conclusions of his CPA. The fact that material is not intentionally hidden fails to meet the requirement that it be fully disclosed. The reliance defense serves the purpose of negating intent to commit an offense. It will not avail as a means of shifting criminal responsibility.

II. THE INDICTMENT

[9] We next consider whether the indictment under which appellant was convicted was deficient in the particulars urged by the appellant. To ensure that an indictment is legally sufficient, it must allege the essential elements

of the offense so as to inform the defendant of the charges he must meet, and it must be at least specific enough that a verdict under it will protect the defendant from double jeopardy. Russell v. United States, 1962, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240, 250; United States v. Mekjian, 5 Cir. 1975, 505 F.2d 1320, 1324.

Count Three of the indictment reads:

> That on or about the 21st day of January, 1972, in the Southern District of Florida,
>
> OAKLEY G. SMITH,
>
> the defendant herein, willfully and knowingly did make and cause to be made false, ficticious and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Health, Education and Welfare, in that cost reports, Social Security Administration Forms 1563, 1562, and 1992, for the fiscal year ending June 30, 1971, were submitted to Blue Cross of Florida, an agent and fiscal intermediary of the United States Department of Health, Education and Welfare, wherein OAKLEY G. SMITH stated and represented that the expenses and costs set forth in Forms 1563, 1562, and 1992, were costs reimbursable under Title 18, Social Security Act, as amended, for the operation of Palm Springs General Hospital, Inc. of Hialeah, Florida. Whereas, in truth and fact, as he then well knew, the expenses and costs set forth in Forms 1563, 1562, and 1992, were not reimbursable costs but included purchases and expenditures which

were false and fraudulently represented to be costs for the operation of Palm Springs General Hospital, Inc. of Hialeah, Florida.

All in violation of Title 18, United States Code, Section 1001.

[10, 11] It is not seriously urged by the appellant that the indictment is so vague that he could be in danger of further prosecution placing him in double jeopardy. The indictment alleges the elements of the offense charged.[15] Appellant's argument on this point centers in his contention that the indictment was so vague that it failed to inform him of the nature of the charges he must meet in order properly to prepare a defense. This argument will not withstand critical analysis in the light of the record. While the actual offense involved was the promulgation of the false medicare forms, as properly stated in the indictment, the substantive acts, or underlying frauds, were the improper expensing of (a) the costs of the house remodel-

[15]The elements necessary to allege a violation of Title 18, U.S.C., Section 1001 are:

(1) a false statement (see, e. g., United States v. Kraus, 5 Cir. 1975, 507 F.2d 113);

(2) made "knowingly and willfully" (United States v. Mekjian, 5 Cir. 1975, 505 F.2d 1320; McBride v. United States, 5 Cir. 1955, 225 F.2d 249),

(3) of a material fact (United States v. McGough, 5 Cir. 1975, 510 F.2d 598; Rolland v. United States, 5 Cir. 1953, 200 F.2d 678),

(4) relating to "matter within the jurisdiction of any department or agency of the United States." (Bryson v. United States, 1969, 396 U.S, 64, 90 S.Ct. 355, 24 L.Ed.2d 264; United States v. Bramblett, 1955, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 494).

The latter case contains a helpful history of the development of Section 1001.

ing, (b) the ICS transaction, and (c) the diaper service, to general hospital accounts. Appellant, doing little more than articulating a conclusion, argues that the complexity of the medicare forms, together with the vagueness of the indictment, made it impossible for defendant to prepare a defense. This argument is without merit. "[T]he validity of an indictment is determined by practical, not technical considerations". United States v. Miller, 5 Cir. 1974, 491 F.2d 638, 649, cert. denied, 1975, 419 U.S. 970, 95 S.Ct. 236, 42 L.Ed.2d 186, citing United States ex rel. Harris v. Illinois, 7 Cir. 1972, 457 F.2d 191, 197, cert. denied, 1972, 409 U.S. 860, 93 S.Ct. 147, 34 L.Ed.2d 106; United States v. Miranda, 5 Cir. 1974, 494 F.2d 783; Robbins v. United States, 10 Cir. 1973, 476 F.2d 26, 30; United States v. Missler, 4 Cir. 1967, 414 F.2d 1293, 1297. The indictment stated the location of the false statements, and the theory under which the government would argue them to be false. More importantly, the defense sought by motion and received extensive bills of particulars which detailed the underlying fraudulent acts already discussed. This was a typical case requiring identification of the transactions relied upon to permit the defendant to prepare for trial. These particulars were supplied by the prosecution. See, in this connection, Rosen v. United States, 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606; United States v. Salazar, 2 Cir. 1973, 485 F.2d 1272, cert. denied, 1974, 415 U.S. 985, 94 S.Ct. 1579, 39 L.Ed.2d 882; Hickman v. United States, 5 Cir. 1969, 406 F.2d 414, cert. denied, 1969, 394 U.S. 960, 89 S.Ct. 1309, 22 L.Ed.2d 561; Van Liew v. United States, 5 Cir. 1969, 321 F.2d 664. The trial transcript demonstrates throughout that the defense was aware of the nature of the transactions relied upon to prove the offense alleged.

[12] Appellant also argues that there was fatal variance between the allegations and the proof in this case. He argues that the supplemental bill of particulars, requested by the defense prior to trial, identifying the ICS transaction as appearing on Social Security Administration form 1562, schedule A, line 1, column 2, varied from the proof. Not so. Schedule A, line 1, column 2, is the place for showing direct expenses of the hospital, other than salary, as shown in the hospital's books. In the report filed, this amount was shown as $1,394,245. Appellant urges that even if the $1,394,245 figure is inclusive of the fraudulent transactions, it is correct because it accurately reflects the books, and the false statement would appear in a later "adjustment" column. This is specious. The figure purports to be hospital expenses. The amount falsely included is not a hospital's expense, even though shown in the hospital's books as such. In other words, appellant's personal building costs and diaper service expense as well as the ICS transaction were incorrectly shown as expense on the hospital's books. They were therefore necessarily incorrectly represented in the total figure of $1,394,245. The figure was indeed false, as the supplemental bill of particulars asserted.

The thrust of the indictment and the bills of particulars was that "purchases and expenditures that were false and fraudulently represented to be costs for the operation of [the hospital]" were included in the Medicare forms. Appellant, because of the many figures and the complexity of the forms argues he could not know which if any of the figures was false. He does not argue in this respect that the forms were correct, just that he could not know where they were wrong. He labors here under a misapprehension. It is not necessary that Smith have known which line was

incorrect when he approved the forms, nor that he be able to properly fill out the forms himself. He is not charged with a mistake, but with an intentional act. It suffices that he understood the forms necessarily to include expenses which were not those of the hospital, and that a percentage of the amount claimed would be reimbursed erroneously to the hospital from HEW. This is what the indictment and the bills of particulars alleged, and what the government proof showed.

III. DUE PROCESS VIOLATION IN PROSECUTION UNDER SECTION 1001

[13, 14] Appellant next contends that the government was required to prosecute Smith's offense under Title 42, U.S.C. Section 408(c),[16] a misdemeanor statute rather than under the false statement statute, Title 18, U.S.C. Section 1001, for a felony. It is established in the jurisprudence of this Circuit that, in a situation of overlapping offenses, prosecution may be brought under either statute at the discretion of the prosecution. United States v. Chakmakis, 5 Cir. 1971, 449 F.2d 315, 316. The inter-relationship of the identical statutes here in question was considered in Chakmakis. A doctor had been convicted of violating Title 18, Section 1001, for filing fraudulent applications for payment under provisions of the Social Security Act. He argued on appeal that he should have been charged under the more recently enacted misdemeanor provision, Title 42, U.S.C. Section 408(c). We stated:

[16]The Social Security Act, Title 42, U.S.C., Section 408 provides Whoever—(c) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter; . . . shall be guilty of a misdemeanor . . .

"[I]t is quite clear that the enactment of the later section di l not repeal the former and that the facts of the all ged offense fell within the terms of either statute. Hence, the prosecution could have been brought under either, at the discretion of the prosecutor. Bartlett v. United States, 10 Cir., 1948, 166 F.2d 920, 926; Hopkins v. United States, 9 Cir., 1969, 414 F.2d 464; Ehrlich v. United States, 5 Cir., 1956, 238 F.2d 481, 485; United States v. Cox, 5 Cir., 1965, 342 F.2d 167, 171, cert. denied [sub nom.] Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700." Ibid. at 316.

Accord, United States v. Fournier, 5 Cir. 1973, 483 F.2d 68; United States v. Brown, 9 Cir. 1973, 482 F.2d 1359, 1360. Binding precedent puts an end to this claim of error.

IV. COMPOSITION OF THE GRAND JURY

[15] The grand jury which indicted appellant had been drawn from a jury wheel filled in December 1968.[17]

[17]The jury plan for the Southern District of Florida, promulgated pursuant to the Jury Selection Act of 1968, Title 28, U.S.C., Section 1861 et seq., was for the wheel of the district to be emptied and refilled from the list of registered voters at specified five year intervals. The jury which indicted appellant was empaneled in April, 1973, four years and four months into the five year plan. The Jury Selection Act was amended in April, 1972, to provide that jury wheels must be emptied and refilled at intervals of not more than four years, and that a new wheel must be made up by Sept. 1, 1973. Provision was made, however, that:

"(b) Nothing in this Act shall affect the composition or preclude the service of any jury empaneled on or before the date on which the qualified jury wheel from which the jurors' names were drawn is refilled in compliance with the provisions of section 3 [28 U.S.C. § 1863]."

The indicting grand jury was thus empaneled according to the applicable provisions of the Jury Selection Act, and its composition was statutorily valid.

At the time of the indictment of Smith, the wheel was four years four months old. Appellant argues that the young and the Cuban Americans of the Miami, Florida, area were unconstitutionally excluded from the grand jury which indicted him, requiring a reversal of his conviction. Again, binding precedent of this Circuit is to the contrary. We have recently had occasion to consider this same argument, and have found no substance in similar attacks on similarly constituted grand juries. United States v. Gooding, 5 Cir. 1973, 473 F.2d 425; United States v. Hill, 5 Cir. 1974, 500 F.2d 733. "The defendant complains that the failure to add to the master jury wheel the names of newly registered voters since 1968 or 1969 occasioned the systematic exclusion of certain 'cognizable groups,' namely young adults between the ages of 21 and 25 years and newly arrived Latin Americans. This argument falls short under previous decisions of this Court. [citations omitted]." Hill, supra, at 738. The Hill court found further support for its decision in Hamling v. United States, 1974, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590. There, faced with the argument that the young had been excluded from the grand jury which had indicted Hamling because of a four year period between the filling of a jury wheel and the subsequent empaneling of the indicting grand jury, the Supreme Court stated:

"[U]nless we were to require the daily refilling of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice. [Citing as examples United States v. Pentado, 5 Cir. 1972, 463 F.2d 355, (three year delay); United States v. Gooding, 5 Cir. 1973, 473 F.2d 425, (three year four month delay), and United States v. Kuhn, 5 Cir. 1971,

441 F.2d 179, (five year delay).] Invariably of course, as time goes on, the jury wheel will be more and more out of date, especially near the end of the statutorily prescribed time period for updating the wheel. But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited 'purposeful discrimination' does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters. Whitus v. Georgia, 385 U.S. 545, 551, 87 S.Ct. 643, 647, 17 L.Ed.2d 599 (1967); see Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972)."

418 U.S. at 138, 94 S.Ct. at 2918, 41 L.Ed.2d at 632. Although Hamling involved solely the question of exclusion of the young, two of the three Fifth Circuit cases cited by the Court dealt not only with the young, but also with Cuban American citizens being excluded from jury service by virtue of the age of the jury wheel. See United States v. Pentado, 5 Cir. 1972, 463 F.2d 355, and United States v. Gooding, 5 Cir. 1973, 473 F.2d 425. There is here no basis for the allegation that the jury wheel was unconstitutionally constituted.

Appellant relies on United States v. deAlba Conrado, 5 Cir. 1973, 481 F.2d 1266, in which this Court remanded for hearing to determine if a cognizable ethnic group, Latin Americans, was systematically excluded from the challenged jury. deAlba Conrado is inapposite since it involved consideration of the procedures under which petit juries were selected from a jury list. The challenge was not addressed to the list, nor to the names in the wheel, but to

the method by which juries were selected from it. Smith's challenge here is to the names in the wheel itself. Hill, Gooding and Pentado, supra, completely foreclose such an attack.

V. INCONSISTENCY OF THE VERDICT

[16] Appellant also argues that his acquittal on eight charges, and particularly the two prior Section 1001 counts (Counts One and Two) of the indictment is so inconsistent with his conviction on the remaining Section 1001 count, Count Three, as to require reversal. This attack is without legal foundation. No explanation is required, but if one were needed, a plausible explanation for this claimed inconsistency is that conviction under Section 1001 requires the willful communication of false information to the government, and that the jury did not impute this knowledge to Smith as to the earlier Section 1001 counts, the proof being based—as it was—on a pattern of irregular acts. Such speculation must remain academic in any event. Consistency in a verdict has never been a requirement for a conviction in courts of the United States. Dunn v. United States, 1932, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356. See also, Hamling v. United States, 1974, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590. This rule has been often applied by our prior decisions. See, e. g., United States v. Guajardo, 5 Cir. 1975, 508 F.2d 1093, 1096; United States v. Kohlmann, 5 Cir. 1974, 491 F.2d 1250, 1253; United States v. Cantu, 5 Cir. 1972, 469 F.2d 679, 680.[18]

[18] As to the continued validity of Dunn, despite some criticism of the reasoning therein of Mr. Justice Holmes, see United States v. Greene, 7 Cir. 1974, 497 F.2d 1968, 1085-86.

VI. DISCRIMINATORY PROSECUTION?

[17, 18] Finally appellant urges us to hold that he was the subject of an illegally discriminatory prosecution. We find no support in the record for this charge. The basis of appellant's prosecution was an intentional criminal act of filing a knowingly false statement. Medicare form mistakes, which, as the appellant contends, the evidence showed to be commonly made by other hospitals, are not, without more, criminal acts. Moreover, the decision of whether or not to prosecute in any given instance must be left to the discretion of the prosecutor. Smith v. United States, 5 Cir. 1967, 375 F.2d 243, 247, cert. denied, 1967, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106; United States v. Cox, 5 Cir. 1965, 342 F.2d 167, 171, cert. denied, 1965 sub nom., Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700. This discretion has been curbed by the judiciary only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights. United States v. Berrios, 2 Cir. 1974, 501 F.2d 1207, 1211. See, United States v. Oaks, 9 Cir. 1975, 508 F.2d 1403; United States v. Swanson, 8 Cir. 1975, 509 F.2d 1205. No such motive has been shown in this case.

VII. CONCLUSION

We find Oakley Smith to have been properly indicted for a violation of Title 18, U.S.C. Section 1001, by a validly constituted grand jury. He received a fair trial at which sufficient evidence was presented to warrant the jury's lawfully returning its verdict of guilty as to Count Three of the indictment. The verdicts rendered were not reversibly inconsistent. The appellant presented no evidence that he was the target of "invidious" prosecutorial discrimination. The conviction is in all respects

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2343

D. C. Docket No. 73-714-CR-JE
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OAKLEY G. SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before BELL, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 17, 1975

Issued as Mandate:

[¶ 6490] SSA-1562 Schedule A—Reclassification of Trial Balance of Expenses (Prov. Reimb. Man., Part I, § 2322.2)

This schedule provides for listing the trial balance of direct expenses as shown by the hospital's general books as follows:

A. Column 1, Salaries

B. Column 2, Other Expenses

C. Column 3, Total Expenses

D. Column 4 provides for the reclassification of data appearing in Columns 1, 2 and 3 for the purpose of effecting proper cost distribution. Schedules A-1, A-2, A-3 and A-4 support such reclassifications.

E. Column 5 reflects adjustments to expenses made on Schedule A-5.

F. Column 6 represents the adjusted expenses to be entered on Worksheet B and apportioned to the patient care cost centers involved. For periods before July 1, 1969, enter on line 35 the 2 percent allowance as computed on form SSA-1563A. This allowance should be combined with administrative and general expense upon transfer to Worksheet B. See § 2322.19 [¶ 6565] and §§ 1100ff. [¶ 5729 et seq.] for further instructions.

When salaries (Column 1) are used as the base for distributing costs on Worksheet B, such salaries should reflect the reclassifications made on Schedule A-1 through Schedule A-4.

United States Court of Appeals,
Fifth Circuit.

No. 74-2343.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Oakley G. SMITH,
Defendant-Appellant.

Feb. 13, 1976.

Appeal from the United States District Court for the Southern District of Florida, Joe Eaton, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 17, 1975, 5 Cir. 1975, 523 F.2d 771)

Before BELL, DYER and SIMPSON, Circuit Judges.

PER CURIAM:

While not affecting our holding in any way, the following corrections are made in our original opinion, 523 F.2d 771, in the interest of accuracy:

(a) The words "75 days" are substituted in lieu of the language "six months", line 2, note 3, page 773 of 523 F.2d.

(b) The second and third complete sentences, lines 4-10, page 780 of 523 F.2d, reading:

"In other words, appellant's personal building costs and diaper service expense as well as the ICS transaction were incorrectly shown as expense on the hospital's books. They were therefore necessarily incorrectly represented in the total figure of $1,394,245."

are withdrawn and the following language is substituted therefor:

"In other words, the ICS transaction was incorrectly shown as expense on the hospital's books. It was therefore necessarily incorrectly represented in the total figure of $1,394,245."

Our original opinion, 523 F.2d 771, is in all other respects adhered to.

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

PROVIDER NO. 10-0050

RECLASSIFICATION OF TRIAL BALANCE OF EXPENSES

PERIOD 7-1-70 thru 6-30-71

Schedule A

LINE NO.	ACCOUNT	TRIAL BALANCE OF DIRECT EXPENSES			TRIAL BALANCE RECLASSIFIED FOR COST APPORTIONMENT	ADJUSTMENTS TO EXPENSES Increases and (Decreases) (See Sch. A-5)	NET EXPENSES FOR COST APPORTIONMENT
		SALARIES	OTHER	TOTAL	TOTAL		
		1	2	3	4	5	6
1	Administration and General	$ 312,909 T	$ 394,245 T	$ 1,707,154 T (1)	$ 1,642,828 T	$ (352,884) T (1)	$ 1,289,944 T
2	Employee Health & Welfare Bene.				80,864 T		80,864 T
3	Dietary – Raw Food		183,771 T	183,771	165,394		165,394 T
4	Dietary – Other Expense	133,433 T	34,028 T	167,461 (2)	167,461		167,461 T
5	Cafeteria	21,310	5,925	27,235	45,612 T	(45,612) T (3)	-0-
6	Housekeeping	117,638	35,376	153,014 T	153,014		153,014 T
7	Laundry and Linen		68,602	68,602 T	68,602		68,602 T
8	Maintenance of Personnel						
9	Operation of Plant	87,361	204,048	291,409 T	291,409	(6,825) T	284,584 T
10	Maintenance of Plant						
11	Nursing Service	821,513	68,912	890,425 T (2)	890,425		890,425 T (1)
12	Nursing School						
13	Medical-Surgical Expense						
14	Intern-Resident Service	78,239	10,049	88,288 T	88,288		88,288 T
15	Oxygen Therapy	39,483	18,963	58,446 T	58,446		58,446 T
16	Medical Supplies and Expense	37,373	75,785	113,158 T	113,158	(5,775) T (5)	107,383 T
17	Pharmacy	31,426	182,438	213,864 T	213,864	(7,128) T	205,736 T
18	Medical Records	34,181	10,303	44,484 T	44,484	(4,395) T	40,089 T
19	Social Service						
20	Operating Rooms	159,845	64,459	224,304 T	224,304		224,304 T
21	Delivery Rooms						
22	Anesthetia	20,186	8,856	29,042 T	29,042		29,042 T
23	X-Ray	115,571	106,711	222,282 T	222,282		222,282 T
24	Laboratory	145,229	182,329	327,558 T (4)	327,558		327,558 T
25	Blood Bank		22,408	22,408 T (4)	22,408		22,408 T
26	Cardiology Wing	169,093	20,936	190,029 T (3)	190,029		190,029 T (1)
27	Physical Therapy	35,653	3,559	39,212 T	39,212		39,212 T
28	Surgery						
29	Outpatient Service						
30	Emergency Service	43,556	11,735	55,291 T	55,291		55,291 T
31	Depreciation–Buildings, etc.					148,047 T	148,047 T
32	Depreciation–Movable Equipment		96,861	96,861 T	96,861		96,861 T
33	Interest Expense		16,538	16,538 T (4)	-0-		
34	Total Expenses	$ 2,403,999	$ 2,826,837	$ 5,230,836	$ 5,230,836	$ (274,572)	$ 4,956,264 T
35	12% Allowance (Column 6) (A)						-0-
36	Total Net Expenses						$ 4,956,264

*NOTE: Transfer the amounts on lines 1 through 36, Column 6, above, to Column 1, Worksheet B.
If hospital practice provides for combining certain of the above amounts this will be acceptable. The prevailing basis for allocation for the center in which combined should be used.

Form SSA-1563 (9-66) (A) Show computation on Form SSA-1563A

EXCERPT FROM NEWSWEEK, DECEMBER 1, 1975

JUSTICE

HOW TO GET YOUR MAN

Though law-enforcement officials have labored for decades to break the power of organized-crime syndicates in the U.S., the results for the most part have been disappointing. The criminals corrupt judges, bribe policemen and terrorize or kill hostile witnesses. Perhaps even more important is the ease with which they can hire the most expensive legal talent to take full advantage of every loophole the laws allow to elude prosecution.

But in the past few years, fueled in part by funds from the Law Enforcement Assistance Administration created by Congress in 1968, Federal, state and local prosecutors have been organizing special task forces to combat the estimated $60 billion-a-year business that organized crime represents. In the process, the prosecutors have come up with a host of interesting techniques, stratagems and legal maneuvers designed to see that they derive at least as much advantage from legal loopholes as the criminals do. In brief, what the prosecutors have done is decide that if they cannot convict a major crime figure of murder, say, or extortion, the next best thing to do with him is try to convict him of perjury, bribery or some lesser offense—much as mobster-murderer Al Capone was finally sent to prison for income-tax evasion 44 years ago.

Inevitably, certain of the prosecutors' current practices have caused concern among some civil libertarians. In two jurisdictions, judges have recently lashed out at the

prosecutors for exceeding their authority. Nevertheless, most of the lawmen are persuaded that their new action-in-concert is paying off. Last December, 46 state and local prosecutors met in Houston, Texas, for an "Advanced Organized Crime Seminar," sponsored by the National College of District Attorneys and paid for by the LEAA. Newsweek has obtained a transcript of their discussions, which affords a candid and revealing view of how effectively they seem to have been able to turn the laws to their own advantage.

Terrorism: Justice Department tax expert James H. Jeffries III, for example, recommended trapping gangsters with a "paper chain" of arcane Federal statutes. "The Federal system," Jeffries said, "is a veritable Christmas shopping catalog of bad things to do to bad people." Robert Ozer, the flamboyant chief of the U.S. Organized Crime Strike Force in Detroit, spoke enthusiastically of "investigation by terrorism." He meant, among other things, swamping crime figures with subpoenas. Baltimore Judge Charles E. Moylan Jr. talked on the often misunderstood subject of grand juries. Strict evidentiary rules do not apply to grand-jury testimony, and jurors can be as hostile as they please. "The prosecutor," said Moylan with a touch of hyperbole, "can violate or burn the Bill of Rights seven days out of seven and bring the fruits of unconstitutional activity to a grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does."

The use of the grand jury for harassment was a favorite weapon of the Johnson and Nixon administrations against antiwar protestors and other radicals. By granting immunity to a particular witness, thus stripping him of his

privilege against self-incrimination, a prosecutor can force the witness to talk about other people—or face a contempt citation. "In the hands of a competent prosecutor, there are few better tools," said New Jersey lawyer and former prosecutor Martin G. Holleran. ". . . Through what other means can you put hoodlums and gangsters into prison without convicting them of a crime? Think of that."

To illustrate, Holleran cited the case of a man he described as "the chief mobster in New Jersey." (The name is deleted from the transcript, but he clearly meant Gerardo Catena, reputed boss of the Jersey branch of the Genovese crime family.) Brought before a state investigation commission, Catena refused to answer a single question, or give his name and address. ("I know where he lives," Holleran noted. "He lives around the corner from me.") For refusing to testify, Catena was cited for civil contempt and jailed for five years. He was finally released last August when the New Jersey Supreme Court ruled that Catena's confinement had lost its "coercive" power.

Most of the prosecutors agreed that their best single weapon is the wiretap—"there is no device as good," said Michael Marcus, a Los Angeles deputy district attorney. Marcus conceded that the public was skittish about the invasion of privacy inherent in wiretaps. But he also reminded his audience that lawmen have harsher legal weapons available. "It is our responsibility," Marcus said, "to inform the public that we now have the right to delve deeper into an individual's personal life through a search warrant than can be done through a wiretap."

Taps: The speakers were at considerable pains to emphasize how meticulous prosecutors must be in their use

of taps—identifying precisely each circumstance and each individual to be spied on when obtaining a court's permission. But they also recommended shopping for amenable judges. One lecturer said that the U.S. Second Circuit, based in New York, "appears to be the most liberal circuit in terms of allowing questionable or potentially excessive eavesdropping practices." Clifford Fishman, a New York State narcotics prosecutor, advised how to co-opt judges. "If you can convince your judge to become a member of the investigative team," said Fishman, "if you can invite him down to the plant . . . then essentially you have gotten his approval of everything you are doing."

As it proceeded, the seminar offered prosecutors a kind of "Dear Abby" list of solutions to their problems.

Problem: Courts will not let you use wiretaps. Solution: Use "pen registers," devices attached to a telephone line that do not intercept messages but do identify the number being called. Or, bug prisoners' cells. Or, place a public telephone in the prisoners' area of a jail and have police officers stroll by to eavesdrop. Some jurisdictions specifically permit the monitoring of prisoners' phone calls and conversations.

Problem: Police undercover cars, often Chevrolets with an antenna, are easily spotted. Solution: Confiscate flashily decorated Thunderbirds or Cadillacs captured from drug pushers—the sort popularly known as "pimpmobiles" —and use those in the inner city.

Problem: Men in hock to criminal loan sharks are afraid to tell the police. Solution: Advertise in the women's pages of newspapers. Women will call in about their husbands' problems.

Problem: Some local policemen are known to be in the pay of criminals and cannot be trusted. Solution: Keep them in the dark until they are needed to make arrests. In New Jersey, a special anti-crime unit called in local police at 7:30 a.m. for a raid that was not actually scheduled until 3 p.m. The police were kept locked up in an armory, without even access to a telephone, which could be used to tip off criminals. Breakfast and lunch were brought in, the caterers were locked up. The raid went off smoothly and netted 58 arrests and an estimated $180,000 in cash. It is known as "the catered raid."

However difficult the prosecutors' lot, judges sometimes find their methods too much to stomach. In Detroit recently, strike-force chief Ozer, who successfully prosecuted former Michigan Governor and state Supreme Court Justice John Swainson, heard some harsh words from U.S. Judge Fred Kaess. "You don't run the courts or the grand jury," Kaess barked in open court. "You work for them."

The chief complaint against organized-crime units seems to be that they are able legally to do almost anything they want—to whomever they select as a target. Some officials of the National College of District Attorneys, disturbed by this thought, are dubious about their continued sponsorship of the crime seminars. But they also recognize that fighting organized crime requires extraordinary methods. The question they now are asking themselves is whether the results they are getting justify the means.

—JERROLD K. FOOTLICK with JON LOWELL in Detroit and ANTHONY MARRO in WASHINGTON

[R. 314]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA

No. 73-714-CR-JE

UNITED STATES OF AMERICA

Plaintiff,

vs.

OAKLEY G. SMITH,

Defendant.

AFFIDAVIT OF JAMES KAUFMAN

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority personally appeared JAMES KAUFMAN, who after being duly sworn deposed and said as follows:

1. My name is James Kaufman. I am a certified public accountant licensed by the State of Florida. My professional qualifications and experience are set forth at length in the trial transcript in the captioned case.

2. This affidavit was prepared for my signature by Mr. Paul Siegel, of the firm of Sinclair, Louis & Siegel. Mr. Siegel informed me that the purpose of this affidavit is to try to assist the federal court in understanding some

of the intricacies in filling out an SSA Form 1562, and that the affidavit would be given to the Honorable Joe Eaton, United States District Judge, at or prior to a hearing in the Oakley G. Smith case scheduled for 15 April 1974.

3. Mr. Siegel asked me to assume, for the purpose of this affidavit, that the following facts are true, although he stated that the defendant did not necessarily admit the truth of any or all of these facts:

a. That during fiscal 1971 Palm Springs General Hospital paid amounts varying from $10,739.06 to $15,739.06 per month to International Computer Sharing, Inc., and these payments are shown on the hospital's books.

b. That during the period between 1 July 1970 and 30 June 1971, International Computer Sharing, Inc. [R. 315] paid to Gregory Robinson the sum of $13,000 in the form of five monthly checks for $2,600 a piece. Mr. Robinson is the nephew of the defendant Oakley G. Smith.

c. That Mr. Robinson performed no services or gave nothing of value to International Computer Sharing, Inc. in exchange for this money.

d. As defined in the Medicare Regulations, International Computer Sharing, Inc. is an organization related to Palm Springs General Hospital, Inc. of Hialeah.

4. Using the foregoing assumptions, Mr. Siegel requested that I carefully examine each of the following statements for accuracy, and I find each to be accurate:

a. On Schedule A of its form 1562, under the section "trial balance of direct expenses", columns 1, 2, and 3, the hospital was required to put down the costs reflected on its books, whether or not these costs were related to patient care or reimbursable under the medicare program.

b. The hospital was required to put down in the first three columns of Schedule A on form 1562 the amounts of money paid by it to International Computer Sharing, Inc., even if some of these costs were not related to patient care and this fact was known to the hospital officials. Specifically, even if the hospital officials who prepared and caused to be submitted the form 1562 knew that $13,000 was paid by International Computer Sharing, Inc. to Gregory Robinson for no services, it was proper to include the amounts actually paid by the hospital to International Computer Sharing, Inc. in columns 1, 2, and 3.

c. Adjustments to the trial balance of direct expenses on Schedule A of form 1562 are made in columns 5 and 6 in order to remove from the costs set forth in the first three columns any not related to patient care or otherwise not reimbursable under medicare. Assuming that International Computer Sharing, Inc. is a related organization, adjustments should have been included on Schedule A-5 and columns 5 and 6 of Schedule A in order to remove the profit of International Computer Sharing, Inc.

d. If the $13,000 was paid by International Computer Sharing. Inc. to Gregory Robinson in fiscal 1971, that sum would properly be included under [R. 316] administration and general on Schedule A column 2 of form 1562 where the sum of $1,394,245 is set forth, but should have been the subject of an adjusting entry on Schedule A-5 and columns 5 and 6 of Schedule A in order to remove it from the net expenses for cost apportionment.

FURTHER AFFIANT SAYETH NOT.

/s/ James Kaufman

James Kaufman

SWORN TO AND SUBSCRIBED before me this 15th day of April 1974.

/s/ Elizabeth Lorenzo Infante

Notary Public, State of Florida
at Large

My Commission Expires Mar. 30, 1976.
Bonded Thru General Insurance Underwriters.

[R. 317]

[TITLE OMITTED]

AFFIDAVIT OF RONALD ZUPA

[Filed April 29, 1974]

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority personally appeared RONALD ZUPA, who after being duly sworn deposed and said as follows:

1. My name is Ronald Zupa. I am a Senior Staff Auditor with Kaufman & Rossin, Certified Public Accountants. In my prior employment with Touche-Ross & Company I had extensive hospital auditing experience, specifically auditing Cedars of Lebanon Hospital, Palmetto General, James Archer Smith Hospital. I also had two years of experience auditing hospitals for a medicare subcontractor. I have had extensive involvement with the preparation and review of SSA Forms 1562.

2. This affidavit was prepared for my signature by Mr. Paul Siegel, of the firm of Sinclair, Louis & Siegel. Mr. Siegel informed me that the purpose of this affidavit is to try to assist the federal court in understanding some of the intricacies in filling out an SSA Form 1562, and that the affidavit would be given to the Honorable Joe Eaton, United States District Judge, at or prior to a hearing in the Oakley G. Smith case scheduled for 15 April 1974.

3. Mr. Siegel asked me to assume, for the purpose of this affidavit, that the following facts are true, although he stated that the defendant did not necessarily admit the truth of any or all of these facts:

a. That during fiscal 1971 Palm Springs General Hospital paid amounts varying from $10,739.06 to $15,739.06 per month to International Computer Sharing, Inc., and these payments are shown on the hospital's books.

[R. 318] b. That during the period between 1 July 1970 and 30 June 1971, International Computer Sharing, Inc. paid to Gregory Robinson the sum of $13,000 in the form of five monthly checks for $2,600 a piece. Mr. Robinson is the nephew of the defendant Oakley G. Smith.

c. That Mr. Robinson performed no services or gave nothing of value to International Computer Sharing, Inc. in exchange for this money.

d. As defined in the Medicare Regulations, International Computer Sharing, Inc. is an organization related to Palm Springs General Hospital, Inc. of Hialeah.

4. Using the foregoing assumptions, Mr. Siegel requested that I carefully examine each of the following statements for accuracy, and I find each to be accurate:

a. On Schedule A of its form 1562, under the section "trial balance of direct expenses", columns 1, 2, and 3, the hospital was required to put down the costs

reflected on its books, whether or not these costs were related to patient care or reimbursable under the medicare program.

b. The hospital was required to put down in the first three columns of Schedule A on form 1562 the amounts of money paid by it to International Computer Sharing, Inc., even if some of these costs were not related to patient care and this fact was known to the hospital officials. Specifically, even if the hospital officials who prepared and caused to be submitted the form 1562 knew that $13,000 was paid by International Computer Sharing, Inc. to Gregory Robinson for no services, it was proper to include the amounts actually paid by the hospital to International Computer Sharing, Inc. in columns 1, 2, and 3.

c. Adjustments to the trial balance of direct expenses on Schedule A of form 1562 are made in columns 5 and 6 in order to remove from the costs set forth in the first three columns any not related to patient care or otherwise not reimbursable under medicare. Assuming that International Computer Sharing, Inc. is a related organization, adjustments should have been included on Schedule A-5 and columns 5 and 6 of Schedule A in order to remove the profit of International Computer Sharing, Inc.

[R. 319] d. If the $13,000 was paid by International Computer Sharing, Inc. to Gregory Robinson in fiscal 1971, that sum would properly be included under administration and general on Schedule A column 2 of form 1562 where the sum of $1,394,245 is set forth, but should have been the subject of an adjusting entry

on Schedule A-5 and columns 5 and 6 of Schedule A in order to remove it from the net expenses for cost apportionment.

FURTHER AFFIANT SAYETH NOT.

/s/ Ronald Zupa
RONALD ZUPA

SWORN TO AND SUBSCRIBED before me this 15 day of April 1974.

/s/ Elizabeth Lorenzo Infante
Notary Public, State of Florida
at Large

My Commission Expires: March 30, 1976.